Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MORDECHAI TASSA, AN INDIVIDUAL, AND DIALTEL, INC., A CALIFORNIA CORPORATION,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES NORTHWEST JUDICIAL DISTRICT,

Respondent.

GER-DAN INTERNATIONAL TELECOM, INC., A NORTH DAKOTA CORPORATION,

Defendant and Real Party In Interest.

Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the procedural requirements of the Federal Arbitration Act, § 4 [9 U.S.C. §4], specifically for a timely demanded jury trial if the making of an agreement to arbitrate be in issue, apply in proceedings to compel arbitration brought pursuant to the FAA in state courts?

2. Whether vesting a court-appointed arbitrator, in the first instance, with the power to determine arbitrability of claims arising under an agreement collateral to that containing the alleged written arbitration agreement is permissible under the FAA, in the absence of "clear and unmistakable" evidence of an agreement between the parties vesting the arbitrator with the power to determine arbitrability of claims?

3. Whether the Respondent Court committed clear error in construing as a binding arbitration clause Paragraph 19.1 of the Ger-Dan Commission Agreement dated January 26, 1995 ("**Commission Agreement**"), which provides as follows:

> 19.0 **MEDIATION**
>
> 19.1 Any controversy or claim arising out of or related to this Agreement or breach of this Agreement shall be settled by **mediation**. The **mediation** shall be conducted by a single **mediator** under the then current commercial Arbitration Rules of the American Arbitration Association provided that the **mediator** shall be freely chosen from a panel of persons knowledgeable in the business of telecommunications.

QUESTIONS PRESENTED - Continued

> The **mediator** shall conclude the **mediation** and issue an award no later than one hundred-eighty (180) days following the service of the demand for **mediation** by either of the Parties. The decision and award of the **mediator** shall be final and binding, and judgment on the award so rendered may be entered in any court having jurisdiction. The prevailing Party shall be entitled to an award of all **mediation** fees and expenses and attorneys' fees and costs. The **mediation** shall be held and the award shall be deemed to be made in Fargo, North Dakota.

("**Paragraph 19.1**") (emphasis supplied).

PARTIES TO THIS APPEAL

Petitioners are Mordechai Tassa, an individual ("**Tassa**") and Dialtel, Inc., a California Corporation ("**Dialtel**") (together, "**Petitioners**"), plaintiffs in the underlying action.

Respondent Court, the Los Angeles County Superior Court, is the trial court which granted the Real Party In Interest's motion to compel arbitration over the objections of Petitioners.

The Real Party In Interest is defendant Ger-Dan International Telecom, Inc., A North Dakota corporation ("**GITI**"). The Petitioners are also informed and believe that a corporation called "Al Gerlach Enterprises, a North Dakota corporation" is either a parent or subsidiary of GITI.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mordechai Tassa, an individual ("**Tassa**") and Dialtel, Inc., a California Corporation ("**Dialtel**") (together, "**Petitioners**") pray that a writ of certiorari issue to review the denial by the California Supreme Court of the Petitioners' Petition for Writ of Review, entered on August 29, 1996, which thereby affirmed the May 30, 1996 Order of the Los Angeles County Superior Court ("**Order**") compelling arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("**FAA**").

OPINIONS BELOW

None of the decisions below have been reported.

JURISDICTION

The Order of the Los Angeles County Superior Court was entered on May 30, 1996. A timely Petition for Writ of Mandate, Prohibition, or Review, etc. ("**Petition for Writ of Mandate**") was filed with the California Court of Appeal for the Second Appellate District, Division 3, on July 29, 1996, and was summarily denied on August 13, 1996. A timely Petition for Writ of Review was filed with the California Supreme Court on August 23, 1996, which was denied on August 29, 1996.[1]

[1] The order denying the Petition for Review indicated, however, that two of the seven justices of the California Supreme Court would have accepted review.

This court therefore has jurisdiction under 28 U.S.C. §1257(a) and Rules of the United States Supreme Court, Rule 10(b) and (c), in that the California Supreme Court has ruled in a manner which conflicts with decisions of at least one other state court of last resort and of a United States court of appeals on an important federal question arising under the FAA, §4 [9 U.S.C. §4].

STATUTORY PROVISIONS INVOLVED IN THIS CASE

TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS
9 USC §2 (1996)

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS
9 USC §4 (1996)

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a

jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

NATURE OF THE CASE AND PROCEDURAL HISTORY

The Petitioners' complaint alleges, in relevant part, that Dialtel is an "independent private payphone provider" ("**IPP**" or "**payphone provider**"), which owns and operates pay telephones. Both of the Petitioners also act as "sub-aggregators" (that is, secondary agents or distributors) who distribute to other payphone providers, on a commission basis, the telecommunications services of defendant and Real Party In Interest herein, GITI.

Petitioners' Complaint also alleges that GITI acts as a "traffic aggregator" or "reseller" of telephone services from "interexchange telecommunications common carriers," such as the American Telephone and Telegraph Company.

Petitioners' complaint alleges the making of three written agreements between GITI and the Petitioners: (a) the Ger-Dan Commission Agreement dated January 26, 1995 ("**Commission Agreement**"), providing for specified commissions to be received by Petitioners on the individual payphone units owned and operated by Petitioners;

(b) the Mutual Non-Disclosure, Non-Circumvention Agreement" dated January 30, 1995 ("**Non-Circumvention Agreement**"), governing Dialtel's role as a "sub-aggregator," referring other payphone operators to GITI, a business relationship *outside* the scope of that outlined in the Commission Agreement; and (c) the Addendum to Commission Agreement dated February 1, 1995 ("**Addendum**"), covering Dialtel's commissions for referral to GITI of one large IPP account.

The Petitioners commenced this action on February 16, 1996 with the filing of their complaint ("**Complaint**") alleging causes of action for among other things fraud, breach of written contract, and interference against the Real Party In Interest.

On April 2, 1996, Real Party In Interest filed its motion for order compelling arbitration ("**Motion**"), under the provisions of the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("**FAA**"). In its Motion, GITI contended that the language of Paragraph 19.1 of the Commission Agreement, set forth above, constitutes an agreement for binding arbitration. In opposing the Motion, the Petitioners made a timely demand, pursuant to FAA, §4, for a jury trial on the issue of whether an arbitration agreement had indeed been made between the parties.

On April 22, 1996, the Motion came on for hearing before the Honorable Thomas Schneider, Judge of the Los Angeles County Superior Court. At the time of the hearing, Judge Schneider ruled, among other things: (a) that Paragraph 19.1 should be construed as a binding arbitration clause; (b) that the arbitrator would be vested with

authority to determine in the first instance whether Petitioners' claims arising under the Non-Circumvention Agreement and the Addendum are arbitrable under the terms of Paragraph 19.1; and most significantly (c) that Petitioners were *not* entitled to a jury trial on the issue of whether arbitration had in fact been intended by the parties, under the provisions of the FAA (9 U.S.C. §4).

At the hearing on April 22, 1996, Judge Schneider struggled with the correct interpretation of 9 U.S.C. §4, and the question of whether a jury trial under is available to the Petitioners:

MR. SPITZER: IF THIS COURT HAS JURISDICTION UNDER THE FEDERAL ARBITRATION ACT, THEN THIS COURT NEEDS TO FOLLOW THE RULES OF PROCEDURE THAT ARE SET DOWN IN THE FEDERAL ARBITRATION ACT IN ORDER TO DETERMINE WHETHER OR NOT THERE IS AN ARBITRATION PROVISION. . . .

Reporter's Transcript, page 16, lines 24 through 28.

THE COURT: . . . . IT SEEMS TO ME IN READING THE LANGUAGE OF 9 USC SECTION 4, I DON'T KNOW WHAT THE LANGUAGE – "THE COURT SHALL HEAR THE PARTIES AND UPON BEING SATISFIED THAT THE MAKING OF THE AGREEMENT FOR ARBITRATION OR THE FAILURE TO COMPLY THEREWITH IS NOT [IN] ISSUE, THE COURT SHALL MAKE AN ORDER DIRECTING THE PART[IES] TO PROCEED IN ARBITRATION IN ACCORDANCE [WITH] THE TERMS OF THE AGREEMENT."

WHAT DOES THAT MEAN IF YOU ARE GOING TO HAVE A JURY ISSUE THEREAFTER?. . . .

Reporter's Transcript, page 17, lines 15 through 23

THE COURT: I FIND THAT TO BE NOT TOLERABLE IN THE SENSE OF A PROCESS. A PROCESS, YOU SAY, "IS THERE AN ARBITRATION CLAUSE?"

I FIND THAT IT IS. I SAY, "PROCEED TO ARBITRATION."

YOU SAY, "WELL, YOU FIND THAT THERE IS AN ARBITRATION CLAUSE, BUT SEND ME TO A JURY TRIAL TO MAKE A DETERMINATION IF YOU ARE RIGHT."

THAT DOESN'T MAKE SENSE TO ME.

I HAVE TO OPT ON THE AMBIT OF THIS CLAUSE RATHER THAN SAYING THERE IS A TWO-STEP PROCESS. FIRST THE COURT FINDS THERE IS AN ARBITRATION CLAUSE AND THEN SENDS IT OUT TO A JURY TO MAKE SURE THAT IT IS RIGHT.

THAT WOULD BE THE FIRST STEP TOWARDS THE ASYLUM FOR ALL RETIRED JUDGES.

Reporter's Transcript, page 18, lines 7 through 21.

On May 30, 1996, the court entered its Order Compelling Arbitration and Staying Action ("**Order**"), which provides in material part:

> 1. Plaintiffs and Defendant Ger-Dan entered into a January 26, 1995, commission agreement (the "**Commission Agreement**") and a mutual, non-circumvention, non-disclosure agreement (the "**Non-Circumvention Agreement**").
>
> 2. Paragraph 19.1 of the Commission Agreement ("**Paragraph 19.1**") is an agreement to arbitrate under the Commercial Arbitration Rules of the American Arbitration Association ("**AAA**") and shall be construed as such. In

addition, Paragraph 19.1 is governed by the Federal Arbitration Act and shall be construed as such.

3. All claims arising from or relating to the Commission Agreement shall be arbitrated. If the arbitrator determines that the claims involving the Non-Circumvention Agreement do not arise from or relate to the Commission Agreement then these claims will revert back to this Court.

4. Plaintiffs are hereby ordered to enter into binding arbitration pursuant to the rules of the AAA with Defendant Ger-Dan in Fargo, North Dakota as provided for in the Commission Agreement. This arbitration must be completed within 180 days of this Order's date. The decision and any award of the arbitrator shall be reduced to judgment in North Dakota such that the judgment may be given full faith and credit by California courts.

On July 29, 1996, Petitioners filed their Petition for Writ of Mandate, Prohibition, Review or Other Appropriate Relief; etc. with the California Court of Appeal, which was summarily denied on August 13, 1996.

The Petitioners then filed their Petition for Review with the California Supreme Court on August 23, 1996, which was summarily denied on August 29, 1996. Two Justices of the California Supreme Court, however, indicated that they would have granted review.

Both of these petitions sought to vacate the Respondent Court's Order and have the case remanded for further proceedings, specifically a jury trial on the issue of whether an agreement for arbitration had been made

between the parties. The Petition also assigned, as error, that portion of the Order vesting the arbitrator with authority to determine the arbitrability of claims arising under the Non-Circumvention Agreement.

REVIEW BY CERTIORARI SHOULD BE GRANTED TO DETERMINE APPLICABILITY OF PROCEDURAL REQUIREMENTS IN STATE COURT PROCEEDINGS, INCLUDING THE RIGHT TO A JURY TRIAL, UNDER SECTION 4 OF THE FEDERAL ARBITRATION ACT

Under the FAA, 9 U.S.C. §4, set out above, if, as in this case, the making of the arbitration agreement be in issue, the court hearing a motion to compel is required to proceed to trial which, if timely demanded, is required to be heard before a jury.

In their Opposition to the Motion, and at the hearing thereon, the Petitioners timely and vehemently asserted their right to a jury determination of whether an agreement for binding arbitration had been made. There was clearly an issue of fact as to the understanding by the parties of the murky language of Paragraph 19.1 of the Commission Agreement, set out above.

In denying the Petitioners' Request for Review of the Respondent Court's Order, the California Supreme Court affirmed, *sub silentio*, the controlling California authority of *Strauch v. Eyring* (1994) 30 Cal.App.4th 181, 35 Cal.Rptr.2d 747, which held specifically that the procedural requirements of FAA, §4 are *not* binding upon state courts in proceedings therein to compel arbitration.

Prior to 1994, California authorities had held that the procedural requirements of FAA §4, including the right to

a jury trial, were binding upon California Courts hearing motions to compel arbitration brought thereunder. *Main v. Merrill Lynch Pierce Fenner & Smith* (1977) 67 Cal.App.3d 19, 24-25, 136 Cal.Rptr. 378 (upholding right to jury trial under FAA in state court proceedings); *Strotz v. Dean Witter Reynolds Inc.* (1990) 223 Cal.App.3d 208, 210 footnote 1, 272 Cal.Rptr. 680 (same).

In *Strauch*, supra, the California Court of Appeal for the First Appellate District revisited the question of whether a timely demanded jury trial is mandated in state court proceedings brought under the FAA, and concluded that the state court is *not* bound by those procedural provisions:

> *Strotz*, therefore, suggests that in state court proceedings under the [Federal] Arbitration Act, the validity issue is determined by jury trial rather than on affidavits or declarations. But on that point *Strotz* is wrong. In the period between *Main* and *Strotz*, the United States Supreme Court held that the *substantive* provisions of sections 1 and 2 of the Arbitration Act apply in state court proceedings. (*Southland Corp. vs. Keating* (1984) 465 U.S. 1, 12, 16, fn. 10 [79 L.Ed.2d 1, 13, 15, 104 S.Ct. 852].) In contrast, the *procedural* provisions of sections 3 and 4 of the Arbitration only apply, by their express terms, to proceedings in federal court, and have not been held applicable in state courts. (*Volt Info. Services v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477 fn. 6 [103 L.Ed.2d 488, 499, 109 S.Ct. 1248].) This means that the right to a jury trial on the validity issue, set forth in section 4 of the Arbitration Act, does not apply in state court proceedings. In California, the validity issue is

> determined upon a petition to compel arbitration.

Strauch, supra, 30 Cal.App.4th at 185-86 (emphasis in original) (footnote omitted).

Petitioners contend that *Strauch* goes too far in concluding that the right to a jury trial provided under FAA, §4 is inapplicable in state court proceedings. Neither of the two cases relied upon by *Strauch*, *Volt* and *Keating*, should be read so broadly.

In *Keating*, the defendant corporation had moved to compel arbitration, but the California Supreme Court, reversing the appellate court, found that statutory claims brought under California's Franchise Investment Law (Corp. Code §§31000 et seq, and specifically §31512) were not subject to the written arbitration agreement and thus required judicial determination. *Keating*, supra, 465 U.S. at 5-6. In finding that §31512 was preempted by the FAA, the *Keating* majority dismissed the argument that its interpretation of the so-called substantive provisions of the FAA, §§1 and 2, rendered the so-called "procedural" provisions, §§3 and 4, superfluous.

> This [argument] misreads our holding and the [Federal Arbitration] Act. In holding that the Arbitration Act pre-empts a state law that withdraws the power to enforce arbitration agreements, **we do not hold that §§3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.**

(emphasis in bold added). This conclusion of *Keating* finds support in Federal Rules of Civil Procedure, Rule 81(a)(3), which provides in relevant part that "[i]n proceedings under Title 9, U.S.C., relating to arbitration, . . . , these rules apply only to the extent that matters of procedure are not provided for in those statutes." *See Government of United Kingdom, etc. v. Boeing Co.*, 998 F.2d 68, 71-72 (2d Cir. 1993).

In *Volt*, the defendant university sued a general contractor, who successfully moved to compel arbitration under the FAA. *Volt*, supra, 489 U.S. at 470-71. The university moved for a stay of arbitration proceedings pending the outcome of related, and possibly dispositive, litigation, from which the contractor appealed. *Id.* In holding that the stay provisions of California's Code of Civil Procedure §1281.2 were *not* preempted by the FAA, the U.S. Supreme Court stated:

> While we have held that the FAA's "substantive" provisions – §§1 and 2 – are applicable in state as well as federal court, *see Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984), we have never held that §§3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. §3 (referring to proceedings "brought in any of the courts of the United States"); §4 (referring to "any United States district court"), are nonetheless applicable in state court. See *Southland Corp. v. Keating*, supra, at [465 U.S.] 16, n. 10 (expressly reserving the question whether "§§3 and 4 of the Arbitration Act apply to proceedings in state courts");. . . .

In *Volt*, the United States Supreme Court expressly *did not* determine the applicability of Sections 3 and 4, the so-called "procedural" sections of the FAA, to state court proceedings brought thereunder. Indeed, the *Volt* majority held that this issue *had not* been resolved, expressly leaving open the possibility that §§3 and 4 might be fully applicable in state court proceedings:

> Appellee contends, however, that §§3 and 4 of the FAA, which are the specific sections claimed to conflict with the California statute at issue here, are not applicable in this state-court proceeding and thus cannot pre-empt application of the California statute. . . . While the argument is not without some merit, **we need not resolve it to decide this case, for we conclude that even if §§3 and 4 of the FAA are fully applicable in state court proceedings**, they do not prevent application of Cal.Civ.Proc.Code Ann. §1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law.

Id. at 476-77 (emphasis in bold supplied) (footnote omitted).

The United States Supreme Court has thus expressly left open the question of whether Sections 3 and 4 of the FAA are applicable in state court proceedings to compel arbitration brought thereunder.

Furthermore, the right to a jury trial under the provisions of the FAA is not a mere procedural nicety, to be cavalierly discarded in state court proceedings. Where federal statutes provide for jury consideration of claims arising thereunder, the state court may not abridge that right. *Samuel v. Stevedoring Services* (1994) 24 Cal. App.

4th 414, 420, 29 Cal. Rptr. 2d 420 ("Just as federal courts are constitutionally obligated to apply state law to state claims, . . . so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under the controlling federal law [are] protected.' " (citations omitted)). See also *Dice v. Akron, C. & Y.R. Co.* (1952) 342 U.S. 359, 361, 96 L.Ed. 398, 402-03, 72 S.Ct. 312 (scope of right to jury trial in state court proceedings brought under the Federal Employment Labor Act is governed by federal and not state law).

Recent California decisions have made it clear that serious, often unintended, consequences may result to litigants who either elect to arbitrate their claims or, willy-nilly, are subjected to binding arbitration under contractual provisions. In *Advanced Micro Devices, Inc. v. Intel Corporation*, 9 Cal. 4th 362, 377-81, 885 P.2d 994 36 Cal.Rptr.2d 581, for example, the California Supreme Court refused to overturn an arbitrator's award which contained a remedy not provided for in the arbitration agreement. The Court held that so long as an arbitrator's choice of remedy bears some "rational relationship" to the contract, it will not be overturned. Similarly, in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28, 10 Cal.Rptr.2d 183, 832 P.2d 899, the California Supreme Court refused to review a legally incorrect arbitration award, holding that an arbitrator does not exceed his authority merely by reaching a legally erroneous decision.

Since the consequences of being relegated to arbitration may be severe, the determination of whether an arbitration agreement was actually made must be ringed

with adequate procedural safeguards, such as the jury determination set out under the FAA. The policy of favoring arbitration should not result in courts blindly "compelling arbitration where none was agreed." *Main*, supra, 67 Cal.App.3d at 32; accord, *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648; *Par-Knit Mills v. Stockbridge Fabrics*, 636 F.2d 51, 54 (3d Cir. 1980).

The California Supreme Court's denial of review of the Respondent Court's Order, effectively affirming *Strauch*, supra, is at odds with the state court of last resort of at least one other state, the Supreme Court of Arkansas (*England v. Dean Witter Reynolds, Inc.*, 811 S.W.2d 313, 314-15 (1991)). In addition, the California Supreme Court's denial of review has only added to the unsettled state of the law, as to applicability of the procedural provisions of Sections 3 and 4 of the FAA in state court proceedings to compel arbitration thereunder, after *Keating* and *Volt*, supra. The determination of this important federal question, as to whether or not those procedural requirements should apply in state court proceedings, has thus been decided by the California Supreme Court, but should be finally resolved by the intervention of this Court.

REVIEW SHOULD BE GRANTED TO DETERMINE THE PROPRIETY OF VESTING AN ARBITRATOR WITH AUTHORITY TO DETERMINE ARBITRABILITY OF CLAIMS ARISING UNDER AGREEMENTS COLLATERAL TO THE AGREEMENT CONTAINING THE DISPUTED ARBITRATION PROVISION

The Respondent Court's vesting of authority in the arbitrator to determine the arbitrability of claims arising

under a collateral agreement between the parties, other than the agreement containing the alleged arbitration agreement, was in conflict with governing authority emanating from this Court. Review is appropriate to correct an error of the state court which has decided a federal question in a manner which conflicts directly with the established decisional law of this Court.

The purported arbitration agreement is set forth in Paragraph 19.1 of the Commission Agreement between the parties. Subsequently, the parties entered into an unrelated agreement, the Non-Circumvention Agreement, covering commissions to be earned by the Petitioners for acting as "subaggregators," referring other payphone providers to the Real Party In Interest. The language of the Non-Circumvention Agreement specifically contemplates a court proceeding, *not* arbitration, for resolution of claims arising thereunder.

> 3. In the event of circumvention or breach of this agreement, either directly or indirectly, the injured party shall be entitled to damages equal to the maximum fee or commission it should have realized from any transaction conducted by the party who is in breach of the agreement. The parties agree that the proper venue for **any action** to enforce the terms of this agreement is the County of Cass, State of North Dakota.
>
> 4. **If either party shall bring an action** to recover payment or other compensation pursuant to the terms of this agreement the prevailing party shall be entitled to a reasonable attorneys's fee, which may be set by the court in the same action or in a separate action brought

> for that purpose in addition to any other relief to which they may be entitled.

(Emphasis added).

Under California law, as enunciated in *Advanced Micro Devices*, supra, 9 Cal.4th at 371-73, authority to determine arbitrability of claims is vested in the first instance in the arbitrator, whose determination is reviewed under a standard of "substantial deference yet meaningful review." Under governing federal law, however, the standard is quite different, and the Respondent Court's action vesting such authority in the arbitrator is clearly in error.

Under the FAA, in order for the court to find authority to determine arbitrability of claims in the arbitrator, there must be a showing of "clear and unmistakable" evidence that the parties had so agreed. *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920, 1924-1926, 131 L.Ed.2d 985 (1995); *PaineWebber, Inc. v. Elahi*, 87 F.3d 589, 594-95 (1st Cir. 1996). In this case, Petitioners dispute in the first instance the Respondent Court's finding that Paragraph 19.1 constitutes an agreement for arbitration; *a fortiori*, they contend that there is no evidence in the record, much less clear and unmistakable evidence, supporting the Respondent Court's reference to an arbitrator of the issue of arbitrability of claims under the Non-Circumvention Agreement.

REVIEW SHOULD BE GRANTED TO CORRECT THE CALIFORNIA SUPREME COURT'S AFFIRMANCE OF THE TRIAL COURT'S CONSTRUCTION OF THE PURPORTED ARBITRATION CLAUSE IN A MANNER CONFLICTING WITH RELEVANT DECISIONS OF THIS COURT

Under the FAA, state law principles of contract construction are relied upon in the first instance to determine whether an agreement has been formed. *First Options*, supra, 115 S.Ct. at 1924; *Volt*, supra, 489 U.S. at 475-76. State law, whether of legislative or judicial origin, is applicable to govern the issues of validity, enforceability, and revocability of contracts generally. *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987).

Under California law, an agreement to arbitrate must be express and specific. *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal. App. 3d 99, 186 Cal. Rptr. 740; *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341); *Victoria v. Superior Court (Kaiser Foundation Hospitals)* (1985) 40 Cal.3d 734, 747, 222 Cal.Rptr. 1, 710 P.2d 833; *Ericksen, Arbuthnot, McCarthy, Kearney and Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322-23, 197 Cal.Rptr. 581, 673 P.2d 251; *Main*, supra, 67 Cal.App.3d at 32.

In its Motion, GITI successfully urged the Respondent Court to conclude that the "mediation" clause set out in Paragraph 19.1 of the Commission Agreement should be read as an agreement for binding arbitration. The Respondent Court's reading of the provision is clearly erroneous on its face. The dispute resolution mechanism described in Paragraph 19.1 is identified

throughout as "mediation," a word with recognized definition as a *non-binding* process, separate and distinct from arbitration. The word "arbitration," which also has a recognized meaning, both legally and in common parlance, appears only twice in Paragraph 19.1, both times in reference to the "Commercial *Arbitration* Rules of the American *Arbitration* Association."

Petitioners contend that the inherent ambiguity of Paragraph 19.1, which identifies its dispute resolution mechanism as "mediation," and not "arbitration," should have been construed *against* the party which caused it, that is, the drafting party, GITI. California Civil Code Section 1654; *Mastrobuno v. Shearson Lehman Hutton Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 1219, 131 L.Ed.2d 76 (1995).

As the Petitioners noted to the Respondent Court in their opposition to the Motion, nor does Paragraph 19.1's reference to the then-current rules of the American Arbitration Association ("**AAA**") help to elucidate the proper construction of this clause. The introduction to the current Commercial Arbitration Rules of the AAA (amended and effective May 1, 1992), at page 5, provides in relevant part:

> The parties might wish to submit their dispute to mediation prior to arbitration. **In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Comercial [sic] Mediation Rules.** There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

(Emphasis added). The AAA Rules also include a proposed mediation clause which can be inserted by the parties "into their contract in conjunction with a standard arbitration provision." *Id.* Notably *absent* from the AAA Commercial Arbitration Rules is *any other reference to mediation.*

Since the Commission Agreement is a form contract drafted by GITI, the established canons of construction call for any ambiguity in said provision to be construed against it. California Civil Code §1654; 1 B. Witkin, *Summary of California Law* (9th Edition), Contracts, §698 at pages 631-32 (1987, as supplemented in 1995); *Mastrubono,* supra, 115 S.Ct. at 1219 (and cases cited therein).

The Respondent Court's unfortunate construction of Paragraph 19.1 as a binding arbitration agreement, as affirmed by the California Court of Appeal and Supreme Court, flies in the face of logic and the reasonable expectations of the parties, particularly the non-drafting parties, Petitioners. Under any reasonable standard, and under conventional canons of contract interpretation, the ambiguities inherent in Paragraph 19.1 should have been construed against their drafter, GITI.

This Court should therefore step into the breach to correct the decision of a state court of last resort on a federal question which is so fundamentally at odds with relevant decisions of this Court, as well as the decisional

law of the forum state regarding canons of contract interpretation. Under these circumstances, review is clearly appropriate.

Respectfully submitted,

DATED: November 26, 1996

LAW OFFICES OF
DANIEL B. SPITZER

DANIEL B. SPITZER
Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, NORTHWEST DISTRICT

MORDECHAI TASSA, an individual; and DIALTEL, INC., a California Corporation Plaintiffs, v. GER-DAN INTERNATIONAL TELECOM INC., a North Dakota Corporation; G-FIVE CORPORATION, a California Corporation; and GRAHAM COMMUNICATIONS LTD., a corporation; and DOES 1 through 100, inclusive. Defendants.	Case No. LC 035991 ORDER COMPELLING ARBITRATION AND STAYING ACTION (Filed May, 30, 1996) DISCOVERY CUT-OFF: None MOTION CUT-OFF: None TRIAL DATE: None

This matter came on for hearing in Department A of the above-captioned court on April 22, 1996, on regular notice of the Motion of Defendant Ger-Dan International Telecom Inc., For Order Compelling Arbitration and Staying Action, the Honorable Thomas Schneider, judge presiding. Plaintiffs appeared through the Law Offices of Daniel B. Spitzer, Daniel Spitzer, and Defendant appeared through White & Case, Travers D. Wood and Mark A. Young.

After reading and considering the papers filed in support of and opposition to this motion, the papers on

file in this action, and the arguments of counsel at the hearing,

IT IS HEREBY FOUND AND ORDERED THAT:

1. Plaintiffs and Defendant Ger-Dan entered into a January 26, 1995, commission agreement (the "**Commission Agreement**") and a mutual non-circumvention, non-disclosure agreement (the "**Non-Circumvention Agreement**").

2. Paragraph 19.1 of the Commission Agreement ("Paragraph 19.1") is an agreement to arbitrate under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and shall be construed as such. In addition, Paragraph 19.1 is governed by the Federal Arbitration Act and shall be construed as such.

3. All claims arising from or relating to the Commission Agreement shall be arbitrated. If the arbitrator determines that the claims involving the Non-Circumvention Agreement do not arise from or relate to the Commission Agreement then these claims will revert back to this Court.

4. Plaintiffs are hereby ordered to enter into binding arbitration pursuant to the rules of the AAA with Defendant Ger-Dan in Fargo, North Dakota as provided for in the Commission Agreement. This arbitration must be completed within 180 days of this Order's date. The decision and any award of the arbitrator shall be reduced to judgment in North Dakota such that the judgment may be given full faith and credit by California courts.

5. All proceedings involving Ger-Dan are to be stayed under 9 U.S.C. § 3, pending a decision by the

arbitrator. As to G-Five and Graham, the trial is stayed, but not any pre-trial proceedings.

6. Discovery as between Plaintiffs and Defendant Ger-Dan shall be permitted in this action to the extent it is not inconsistent with the applicable rules of the AAA.

7. The Court's findings in connection with this proceeding shall be limited to findings and orders related to the instant motion and will not otherwise bind the parties as to any claims or defenses in any subsequent proceedings.

8. The Status Conference to be held on December 12, 1996, at 1:30 p.m. will be vacated.

IT IS SO ORDERED.

Dated: May 30, 1996

/s/ Thomas Schneider
Judge of the
Superior Court

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 DATE: 08/13-96

Daniel B. Spitzer
16311 Ventura Blvd.
Suite 1200
Encino, CA 91436 2152

RE: Tassa, Mordechai
VS.
S.c.l.a.
Ger-Dan International Telecom, Inc.
2 Civil B104061
Los Angeles No. LC035991

THE COURT:

The petition for writ of Mandate-Prohibition-Stay is denied.

Second Appellate District, Division Three,
No. B104061 S055694

IN THE SUPREME COURT OF CALIFORNIA

(Filed Aug. 28, 1996)

MORDECHAI TASSA, Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent
GER-DAN INTERNATIONAL TELECOM, INC.,
Real Party in Interest

Application for stay and petition for review DENIED.

Mosk, J. and Kennard, J. are of the opinion the application and petition should be granted.

/s/ George
Chief Justice